

**FULBRIGHT
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July 31, 2012

Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

VIA FAX

Re: Use Determination Application No. 07-11971
TCEQ Docket No. 2008-0832-MIS-U
Borger Energy Associates, LP
Appeal of Purported Negative Use Determination

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2012 JUL 31 PM 4:20
CHIEF CLERKS OFFICE

Dear Ms. Bohac:

We represent Borger Energy Associates, LP (Borger), the applicant in the above-referenced matter. Our client is in receipt of the July 10, 2012 letter from Chance Goodin in which he purports to issue a negative use determination on behalf of the Executive Director for Borger's application. This July 10, 2012 letter was served without an accompanying document signed by the Executive Director.

Pursuant to 30 Tex. Admin. Code § 17.25(a)(2)(A), Borger files this appeal of the purported negative use determination, and it does so without waiving its right to contest whether or not the Executive Director's presumed agent has in fact issued a lawful negative use determination. The information required under 30 Tex. Admin. Code § 17.25(b) is as follows:

- (1) **provide the name, address, and daytime telephone number of the person who files the appeal:**

The undersigned is filing this appeal on behalf of Borger. All correspondence for this appeal should be sent to the following:

Edward Kliwer
Fulbright & Jaworski L.L.P.
300 Convent Street, Suite 2100
San Antonio, Texas 78205-3792
Telephone: (210) 270-7144
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Bridget C. Bobac
July 31, 2012
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- (2) give the name and address of the entity to which the use determination was issued;

Borger Energy Associates, L.P.
7001 Boulevard 26, Suite 310
North Richmond Hills, Texas 76180

- (3) provide the use determination application number for the application for which the use determination was issued;

Use Determination Application 07-11971

- (4) request commission consideration of the use determination; and

This letter is a formal request to the Commission for consideration of the purported negative use determination.

- (5) explain the basis for the appeal.

In 2008, Borger applied for a pollution control use determination for two heat recovery steam generators (HRSGs) and support systems at its Blackhawk Station, which is a cogeneration facility which avoids the use of traditional steam boilers. Borger's equipment meets or exceeds regulations issued by environmental agencies to control or reduce air pollution. *See, e.g.*, 30 Tex. Admin. Code § 117.3010; § 106.512; 40 CFR 60.44 subpart DA & DB; 40 C.F.R. § 50.11.

Specifically, the equipment's increased thermal efficiency, as compared to a traditional steam boiler, reduces the fuel needs for the same output, while reducing associated air emissions such as nitrogen oxides (NOx). In addition, the duct burners inside the HRSGs, as designed, may further reduce plant air emissions with additional NOx controls, but such air emissions reductions occur in addition to the efficiency-based reductions.

In 2008, the Executive Director granted a 100% positive use determination for Borger's HRSGs.

However, Hutchinson County Appraisal District appealed to the Commission regarding the positive use determination, and that appeal eventually resulted in the July 10, 2012 letter that purports to issue a negative use determination on Borger's application.

In 2008, the Executive Director correctly applied the law to Borger's facility, as well as to many other similar facilities. In 2012, the Executive Director failed to correctly interpret the controlling statute and applicable regulations. Among other things,

- The Executive Director has not lawfully issued a negative use determination.
- The Executive Director misunderstands the nature, function, and pollution control benefits of Borger's HRSGs. The Executive Director has failed to offer a reasoned and timely explanation for finding 0% pollution control and for rejecting Borger's justifiable

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expectations that its equipment was 100% pollution control property as properly determined in 2008.

- The HRSGs at Borger's facility satisfy the statutory definition of 100% pollution control and otherwise fully comply with applicable regulations. Alternatively, the HRSGs are entitled to a partial use determination.
- The Executive Director has applied the wrong administrative rules. On January 1, 2008, Borger was entitled to a 100% positive use determination under Tier II. Alternatively, the appropriate administrative rules were those in effect when Borger filed its application. The 2010 rules are invalid and have no force or effect relative to Borger's application. As applied to Borger, the 2010 rules are unconstitutional because they are an unconstitutional retroactive application of law and violate both due process and equal protection.
- The Executive Director has acted arbitrarily and capriciously, has treated similar property in conflicting ways despite statutory and constitutional prohibitions to the contrary, and has deprived Borger of due process and equal protection.

We look forward to briefing this matter in full and would greatly appreciate the opportunity to address the Commission in person.

Please note that we are providing copies of this notice of appeal to the individuals and entities identified on the Commission's mailing list from Docket No. 2008-0832-MIS-U.

Respectfully submitted,

Edward Kliever III

Edward Kliever III

Counsel for Borger Energy Associates, LP

with permission

Debbie Kanud

EK/sbc

cc: mailing list from Docket No. 2008-0832-MIS-U

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July 31, 2012

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Solo Page, No Cover

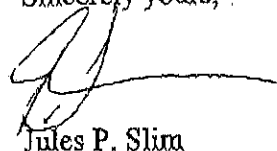
Re.: Docket No. 2011-1935-PST-E
Park Abrams Enterprises, LLC

Dear Ms. Bohac:

Please accept this letter as a denial of the allegations in the above-referenced TCEQ action, and a request for a formal hearing.

As always, thank you for your thoughtful attention to this matter. Please do not hesitate to call with any questions or comments.

Sincerely yours,



Jules P. Slim

CC: Philip Goodwin, P.G., Staff Attorney (Via Fax 512-239-3434)
Garrett Arthur, Public Interest Counsel (Via Fax 512-239-6377)

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FACSIMILE TRANSMISSION

DATE: July 31, 2012

MATTER NUMBER: 13320

08013320
(Borger)

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RE: Appeal of Purported Negative use Determination
Borger Energy Associates, LP

NUMBER OF PAGES INCLUDING COVER PAGE: 4

MESSAGE:

2012 JUL 31 PM 4:20
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
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